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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. UIKIRIFI FRANCISCO LEATIGAGA-LOPEZ, Appellee.	2 CA-CR 2010-0415 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101033001

Honorable Deborah Bernini, Judge

VACATED AND REMANDED

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K E L L Y, Judge.

¶1 Following a jury trial, appellee Uikirifi Leatigaga-Lopez was convicted of possession of drug paraphernalia and possession of a dangerous drug. He was sentenced

to substantially mitigated, concurrent terms of imprisonment, the longest of which was six years. On appeal, the state argues the trial court erred in imposing less than the presumptive sentence. For the reasons that follow, we vacate and remand for resentencing.

Background

¶2 We view the evidence in the light most favorable to sustaining the sentencing court's factual findings. *Cf. State v. Childress*, 222 Ariz. 334, ¶ 9, 214 P.3d 422, 426 (App. 2009). After the jury found Leatigaga-Lopez guilty of the charged offenses, the court held a "priors trial" on the state's allegations that he had prior felony convictions and had been on probation at the time he committed the current offenses. The state requested that the court impose the presumptive term on each count. The court found the prior convictions proven but found the evidence was insufficient to prove that Leatigaga-Lopez had been on probation at the time of the offenses. The court then imposed substantially mitigated sentences on each count, as described above. This appeal by the state followed.

Discussion

¶3 The state argues the trial court erred by "failing to find that [Leatigaga-Lopez] was on probation at the time of the current offenses" and, as a result, "imposed illegal sentences" when it sentenced him to less than the presumptive terms. *See* A.R.S. § 13-708(C) (requiring not less than presumptive sentence for offenses committed while on probation). As a preliminary matter, however, Leatigaga-Lopez asserts that, pursuant to *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 767 P.2d 226 (App. 1989), we

lack jurisdiction to address the state's appeal. In *McDougall*, we noted that "in a criminal proceeding, appeals by the state are not favored and cannot be taken in the absence of a constitutional provision or statute clearly conferring that right." 159 Ariz. at 340, 767 P.2d at 227.

¶4 The state filed its appeal pursuant to A.R.S. § 13-4032(5), which provides, in part, that the state may appeal "[a] sentence on the grounds that it is illegal." Leatigaga-Lopez claims § 13-4032(5) does not permit an appeal under these circumstances because the state is challenging the trial court's finding regarding his probationary status, not appealing an illegal sentence. He maintains that, pursuant to *McDougall*, when a trial court's error precludes finding a prior conviction, the resulting sentence is not "illegal" under § 13-4032(5) and the state cannot appeal. *See id*. at 341, 767 P.2d at 228.

¶5 We need not determine whether *McDougall* applies in this circumstance, however, because, as the state points out, § 13-4032(5) also permits an appeal "if the sentence imposed is other than the presumptive sentence authorized by [A.R.S.] § 13-702, § 13-703, § 13-704 or § 13-706, subsection A." Here, the court imposed substantially mitigated sentences on both counts. Therefore, even assuming the state's appeal is improper on grounds of sentence illegality, it is authorized under § 13-4032(5) because the sentences imposed were "other than the presumptive sentence[s] authorized."

¶6 Leatigaga-Lopez also contends the state did not argue below that § 13-708(C) required presumptive sentences for offenses committed while on probation, and,

therefore, has not preserved the issue for appeal.[1] *See State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) (to preserve issue for appeal, appellant must make sufficient argument to allow trial court to rule). But, the state argued that Leatigaga-Lopez was on probation and requested the presumptive terms. We conclude this was sufficient to preserve the issue for appeal.

¶7 We turn then to the state's contention that the trial court erred by finding it had not proven that Leatigaga-Lopez was on probation at the time he committed the current offenses. "We review a trial court's sentencing decision for an abuse of discretion . . . ." *State v. Rodriguez*, 200 Ariz. 105, ¶ 3, 23 P.3d 100, 101 (App. 2001). "An abuse of discretion is characterized by arbitrariness or capriciousness, and the failure to conduct an adequate investigation into the facts relevant to sentencing." *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). "We defer to the trial court's factual findings that are supported by the record and not clearly erroneous." *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶8 The state was required to prove by clear and convincing evidence that Leatigaga-Lopez was on probation at the time he committed the offenses. *Cf. State v. Cox*, 201 Ariz. 464, n.8, 37 P.3d 437, 444 n.8 (App. 2002) (Barker, J., concurring specially). At trial, Leatigaga-Lopez testified he was on probation and had been since 2007. April Espy, Leatigaga-Lopez's former probation officer, likewise confirmed at

[1]Leatigaga-Lopez cites A.R.S. § 13-708(D), which addresses sentencing for offenses committed while on pretrial release, rather than offenses committed while on probation. Because Leatigaga-Lopez's argument refers to language from § 13-708(C) and because the state does not raise any issues on appeal regarding § 13-708(D), we assume Leatigaga-Lopez intended to cite § 13-708(C).

trial that Leatigaga-Lopez had been "on [her] caseload and under [her] supervision" at the time the offenses were committed. During the priors trial, the state referred to Leatigaga-Lopez's earlier trial testimony and reminded the court that Espy also had testified "he was on probation for his most recent case." Espy again testified at the priors trial and identified Leatigaga-Lopez in court. Additionally, the state submitted certified copies of documents indicating that Leatigaga-Lopez had been placed on probation in 2008 for a period of four years.[2] Leatigaga-Lopez did not dispute that he had been on probation.[3]

¶9 Based on the above, we conclude the state presented clear and convincing evidence that Leatigaga-Lopez was on probation at the time he committed the offenses. *See Cox*, 201 Ariz. 464, n.8, 37 P.3d at 444 n.8; *see also State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995) (finding parole officer's testimony defendant on probation and certified copies of documents showing defendant's convictions "more than sufficient" to establish defendant on probation at time of offense). The trial court's finding to the contrary was unsupported by the record and clearly erroneous. *See Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307. Because Leatigaga-Lopez was on probation at the time he committed the offenses, the court abused its discretion by

[2]The trial court acknowledged it was "highly unlikely" that Leatigaga-Lopez's term of probation imposed in 2008 would have been so brief that he would not have been on probation at the time of the current offenses but stated "there was additional evidence" it needed to hear. As noted, however, the unchallenged exhibits submitted by the state establish that Leatigaga-Lopez was given a four-year term of probation in 2008, twenty-one months before he committed the current offenses.

[3]Indeed, while arguing a separate motion during the priors trial, Leatigaga-Lopez stated that the trial court should consider "the fact [that Espy] never filed a petition to revoke probation based on [the current] charges."

imposing substantially mitigated sentences. *See* § 13-708(C); *Thomas*, 142 Ariz. at 204, 688 P.2d at 1096.

Disposition

¶10 We vacate Leatigaga-Lopez's sentences and remand for resentencing consistent with this decision.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge